IN THE

Supreme Court of the United States.

Farr & Bailey Manufacturing Company,
Appellees,

v.

International Navigation Company,
Appellant.

In the matter of the petition of the International Navigation Company for a Writ of Certiorari directed to the Circuit Court of Appeals, for the Third Circuit.

BRIEF FOR PETITIONER.

The facts are sufficiently set forth in the Petition for Certiorari. That the four eminent judges who have had the case before them were evenly divided upon the question whether or not the case of the *Silvia*, 171 U. S., 462, can be fairly distinguished from the present case, would of itself seem to justify the petition. There is also the very important question whether a fault in the management of a vessel, because committed by those in charge *before* sailing, renders the owner liable notwithstanding the Harter Act; a point not yet settled by this Court. Until this Court shall speak further as to the true scope and meaning of the Harter Act there must be doubt and uncertainty arising from the present condition of the law in the Third Circuit.

Judge DALLAS in his opinion (Record, pp. 109 and 111) finds that the goods were stowed in such manner as to admit of free access being had to the port, and that when the vessel sailed the port hole "was probably closed. But be this as it may, certain it is that it was not securely fastened," and he concludes that by reason of this fact the vessel was unseaworthy at the time of sailing, and the owner thereby deprived of the exemption of Section 3 of the Act of July 1, 1893, known as the "Harter Act." In this opinion Judge ACHESON concurs; while Judge GRAY dissents, holding that "If the ship when she left port was not defective in structure or equipment, she was within every reasonable definition of the term seaworthy." And that the reasoning in the case of the *Silvia*, 171 U. S. 462, was on every point applicable and of binding authority, the facts being precisely similar.

Which view as to the meaning of the Harter Act and the applicability of the *Silvia* is to prevail?

I.

Seaworthiness Under the Harter Act.

The Act of July 1, 1893, Section 3, provides,

> "That if the owner of any vessel transporting merchandise * * * shall exercise due diligence to make the said vessel, in all respects, seaworthy and properly manned, equipped and supplied, neither the vessel, nor her owner * * * shall become or be held responsible for damages or loss resulting from fault or error in navigation *or in the management of said vessel.*"

It is fully conceded that the decisions of this Court in the cases of *The Delaware*, 161 U. S. 459; *The Carib Prince*, 170 U. S., 655, etc., hold that this Act has not modified the obligation of owners to furnish a seaworthy ship so far as structure, equipment and supplies are concerned; that this obligation is a warranty which cannot be discharged even by the exercise of due diligence on

the part of the owners. The cases above cited were those where *unseaworthiness in structure or equipment* was shown —*e. g.*, defects in rivets and bolts.

But in the present case it is not disputed that when the ship left port she was in all respects seaworthy in structure and equipment, properly manned and supplied. There was no defect in the matter of ports or deadlights; but the covers of one of the ports (easily accessible) were insufficiently fastened, and although able to resist the force of the sea for four or five days, eventually worked open and admitted the water. The insufficient fastening of the port covers was admittedly a fault in the management or use of the equipment, and not a defect of the equipment itself, and the persons guilty of this fault were shown to be not the shore servants of the owners, but those entrusted with the navigation and management of the ship while on her voyage, viz., the mates and the carpenter, themselves of course under the supervision of the master.

In cases of this kind, quite apart from the Harter Act, two distinctions are to be noted, viz.: (1) Between the agents employed by the owner on shore, for the proper construction and equipment of the vessel, and the agents employed for its management and navigation at sea and (2) between lack of proper equipment and misuse of proper equipment.

(1). As to agents—owners are absolutely bound by the acts of their shore agents, in respect of the structure and equipment of the vessel; the faults of these agents are the faults of the owner, and the Courts in such cases have been rightly loath to relieve ship owners in any degree from their strict warranty of seaworthiness. Quite different is the responsibility of owners for the acts of those charged with the management and navigation of the vessel—who may be called the owner's sea agents—

where the measure of liability for faults is not a strict warranty of faultlessness, but *due diligence in their selection.* A vessel must be properly manned as well as equipped, in order to be seaworthy, but the former obligation is complied with by the employment of a sufficient number of experienced navigators, officers and men who have been selected with due care. To these is confided the management of the ship's appliances, the pipes, valves, ports and hatches and other equipments, whether she be in port loading or discharging cargo, or at sea; and it would seem an arbitrary rule that fixes the moment of sailing as a fatal limit of time with respect to which acts of management performed prior thereto render the vessel unseaworthy, while the same acts performed by the same agents an instant after the moment of sailing have no such effect. Such, however, must be the result unless the owner, to fulfil his warranty of seaworthiness, is bound himself to go down into a compartment and with his own hands close and screw up the ports and batten the hatches or send a shore representative to do it. Antecedently of any Statute, one recognizes the propriety of a different degree of responsibility for the acts of *management* by sea agents, whether occurring *before* or after sailing, from that imposed for the acts of shore agents in constructing and equipping the ship. Now comes the Act of 1893, providing that if the owner shall exercise due diligence to make the vessel in all respects seaworthy and properly manned, he shall not be responsible for loss resulting from fault or error in the management of said vessel. What can be plainer than that the Statute was intended to relieve owners from the faults of management of their sea agents, *both before and after* leaving port. The authorities sustain this view.

In the *Glenochil*, 1896, Prob. p. 10, 15, President JEUNE in construing these words of the Statute said:

"I do not say whether navigation, in the strict sense of the term, is limited to the period during which the vessel is sailing, that is to say in motion, *but I see no reason for limiting the word 'management' to the period of the vessel being actually at sea.*"

In the same case GORELL BARNES, J., said (p. 19):

"It seems to me that all exceptions extend from the time that all the cargo was taken on board to the discharge, though the terms of the exemptions themselves may not cover there is nothing here to limit the time during which the word 'management' extends, and it seems to me it must extend, as the County Court Judge has said, up to the time that the cargo is finally delivered."

In the *Rotherfield*, 8 R. I. D., § M, pp. 102, 104, the Marseilles Tribunal of Commerce in construing an exception in an English bill of lading exonerating the ship owner from responsibility for the fault of pilots, officers and crew, in the "management or navigation of the ship," defined the word "management" as follows:

"It includes certain accessory operations, which without being properly called navigation, enter into the precautions to be taken for the benefit (interest) of the ship, either in *loading or discharging* the merchandise."

In *Carmichael & Co.* v. *The Association*, L. R., 19 Q. B D., p. 242, the failure to properly fasten the port or shutter which admittedly existed before sailing, was held by the Master of the Rolls to fall within the clause "improper navigation of the ship."

We by no means admit that in the present case the fault of management occurred prior to sailing. There is no direct evidence as to when the port covers were insufficiently fastened; but apart from this, in all such cases the "fault" has a double aspect—the act of commission before sailing, by which the port hole or other equipment is placed in an insecure condition, and the act of omission occurring after the vessel sails, in the failure to close or otherwise remedy the insecure condition. Thus in the case of the *Silvia*, already cited, the closing of the glass cover and leaving the iron one open

was a fault which occurred before sailing, while the failure to close the iron cover was a fault occurring after sailing. In our case there was the same failure to remedy the defect after sailing. So it is not essential to our position to prove that the authorities extend the word "management" to faults occurring before sailing.

See the *Sandfield*, 79 Fed. 371, where the sluices were left closed at sailing, the fault causing the damage as much as the failure to open them after sailing.

So in the *Mexican Prince*, 82 Fed., 484, it was the failure to close the valve before sailing as much as the failure to close it afterwards.

(2). Then there is the distinction between *lack* of proper equipment and mere *misuse* of the equipment: the failure to secure many parts of the ship which are in ordinary practice open from time to time, no doubt limiting the safety both of cargo and passengers, but not thereby rendering the vessel unseaworthy.

As Judge Gray in his dissenting opinion, says, (Record p. 115):

> "If properly equipped with hatch coverings and tarpaulins, it does not render a ship unseaworthy if they are left open or insecurely fastened. If they are, it is a fault of the navigation or management.
>
> "So, if a ship is properly equipped with anchors and the requisite tackle for stowing them, it does not render her unseaworthy if on leaving port the anchors are allowed to swing from the catheads, whereby there is danger of knocking a hole in the bows when the ship encounters head seas. It is a fault of the management and navigation to so leave them."

And he cites the case of *Headley* v. *Pinckney & Sons S. S. Co.* App. Cas. 1894, 222, also cited with approval by Mr. Justice GRAY of this Court in his opinion in the *Silvia*, 171 U. S., 465.

In that case, (*Headley* v. *Pinckney & Sons S. S. Co.*) a ship sailed with stanchions and rails on board, but not set up as they ought to have been. A storm coming on,

a seaman engaged in performing his duty fell overboard in consequence of the neglect to ship the stanchions and rails and was drowned. The House of Lords held that this was a neglect of duty but did not render the ship unseaworthy. After defining the word "seaworthy" and approving *Steele* v. *S. S. Co.*, 3 App. Cases, 72, LORD HERSCHELL said:

"After she left that port her hull and equipment remained precisely what they were at the time of her departure. She was in all respects efficiently equipped, *the fault was in not making use of the equipment with which she had been furnished.* * * * If any of the necessary appliances were lost or destroyed in the course of the voyage, it would no doubt be the duty of the master to use all reasonable means to supply others in their places just as it might be his duty during the voyage to restore the hull or machinery if damaged to a condition suited to the perils to be encountered; but if the appellant's argument were to prevail it would have a much wider scope than I am able to gather from the words of the enactment was intended by the Legislature.

"The failure properly to secure many parts of the ship which are in ordinary practice open, from time to time, would no doubt diminish the safety of those serving on board her, and be a source of danger to them; but I do not think it could reasonably be said that because in such a case a bolt was not securely fixed the vessel thereupon became unseaworthy."

See also the *Carron Park*, L. R. 15 Prob. Div., 203.

The *Mexican Prince*, 82 Fed. 484.

The *Sandfield*, 92 Fed. 663.

Bearing in mind the purpose of the Harter Act, can it be doubted that while not intended to modify the ship owner's strict warranty of seaworthiness in respect of structure and equipment (as decided in the *Delaware* and the *Carib Prince*, *supra*), it did intend to relieve the ship owner, provided he had furnished perfect structure and equipment and used due diligence in manning his ship, from acts of management on the part of his sea agents, whether occurring before or after sailing.

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II.

The applicability of the "Silvia" Case.

Judges McPherson and Gray declare that this case is ruled in favor of the petitioner by the *Silvia* case (171 U. S. 462); Judges Dallas and Acheson hold the contrary.

In the case of the *Silvia* cargo was injured by sea water which came through a port in one of the compartments of the between decks which at the time was only used for the storage of ropes and extra gearing. The entrance to the compartments was by a hatch which had been battened down, but which could be opened in two minutes. The port was furnished with a glass cover and with an extra cover of iron, and was eight or nine feet above the water when the vessel was deep laden. At the time of sailing only the glass cover was closed. Six or eight hours after getting out to sea rough weather was encountered, and water was discovered to be entering the engine room; an investigation showed that the glass cover was broken, and the water had entered the compartment in consequence. Whether the cover was broken by the force of the seas, or by floating timber, or a piece of wreckage, was wholly a matter of conjecture.

It was held by this Court that the ship was not unseaworthy by reason of beginning the voyage with the iron shutter left open, and the neglect to close it was a fault or error in navigation or in the management of the vessel within the meaning of section 3 of the Harter Act.

Mr. Justice Gray saying:

"But the contention that the *Silvia* was unseaworthy when she sailed from Mantanzas is unsupported by the facts. The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport. The port holes of the compartment in question were furnished both with the usual glass covers and with the usual iron shutters or deadlights; and there is nothing in the case to justify an inference that there was any defect in the

construction of either. When she began her voyage, the weather being fair, the glass covers only were shut, and the iron ones were left open for the purpose of lighting the compartment. Although the hatches were battened down, they could have been taken off in two minutes, and no cargo was stowed against the ports so as to prevent or embarrass access to them in case a change of weather should make it necessary or proper to close the iron shutters. Had the cargo been so stowed as to require much time and labor to shift or remove it in order to get at the ports, the fact that the iron shutters were left open at the beginning of the voyage might have rendered the ship unseaworthy. But as no cargo was so stowed, and the ports were in a place where these shutters would usually be left open for the admission of light, and could be speedily got at and closed if occasion should require, there is no ground for holding that the ship was unseaworthy at the time of sailing. *Steele* v. *State Line Steamship Co.*, 3 App. Cas., 72, 82, 90, 91; *Hedley* v. *Pinkney Steamship Co.* (1892), 1 Q. B., 58, 65, and (1894) App. Cas., 222, 227, 228; *Gilroy* v. *Price* (1893), App. Cas., 56, 64." * * * * *

"This case does not require a comprehensive definition of the words 'navigation' and 'management' of a vessel within the meaning of the act of Congress. They might not include stowage of cargo, not affecting the fitness of the ship to carry her cargo. But they do include, at the least, the control, during the voyage, of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the seas; and if there was any neglect in not closing the iron covers of the ports, it was a fault or error in the navigation, or in the management of the ship. This view accords with the result of the English decisions upon the meaning of these words. *Good* v. *London Steamship Owners' Association*, L. R. 6 C. P., 563; *The Warkworth*, 9 Prob. Div. 20, 145; *Carmichael* v. *Liverpool Shipowners' Association*, 19 Q. B. D., 242; *Canada Shipping Co.* v. *British Shipowners' Association*, 23 Q. B. D., 342; *The Ferro* (1893), Prob. 38; *The Glenochil* (1896), Prob. 10."

Judge GRAY in the Court below (Record, p. 116) said:

"The reasoning in the case of the *Silvia*, 171 U. S. 462, however seems to me on every point applicable to the present case, and to be of binding authority on this Court, as it was considered to be by the learned Judge of the Court below. The facts in that case were precisely like those in the present case. The only difference being that in the *Silvia* the iron cover over the port was left open, while in the *Indiana* the glass cover was left open or insecurely fastened."

This view is sustained by analysis of the facts of the two cases. In both cases access to the ports was easy and unobstructed by cargo, thus fulfilling the test of physical

accessibility laid down in *Steele* v. *State Line S. S. Co.*, 3 App. Cases, 72, which has been followed in so many cases both in England and in this country, and finally approved by this Court in the case of the *Silvia*. In both, the owners had used due diligence in making the vessel generally seaworthy; in both the appurtenances of the port were of the same general size and character and structurally fit; in both the port in question was situated in the 'between' decks, or deck below the steerage in a compartment often occupied by passengers, but on the voyage in question not so occupied; in both cases access to the compartment was by a hatchway covered and battened down, but capable of being opened in an equal period of time. In the case of the *Silvia* the port was about eight feet above the water line, in our case about four and a half. In the case of the *Silvia*, the damage occurred six or eight hours after the vessel had left her dock, in our case not until four or five days had elapsed. The only difference between the two cases is, that in the case of the *Silvia* the iron cover was not closed, while in our case neither glass nor iron cover were sufficiently fastened.

If the *Silvia* is to be deemed seaworthy, why not the *Indiana?* Upon what fact is the Court prepared to distinguish one case from the other? The difference of two or three feet from the height of the water did not, or could not, affect the case; in fact, the *Indiana* went much longer without taking in water than did the *Silvia*. Failure to close the glass cover as well as the iron cover merely increases the degree of negligence, but does not alter the character of the act. In both cases, the proper appliances existed, the only fault was the failure to use them. The cases are alike in the only decisive and controlling circumstance, the *accessibility of the open or insufficiently protected port.* If the Court adopts any other test than this, where is the line to be drawn?

Judge DALLAS seeks a distinction between the two cases from the fact that in the *Silvia* the ports were usually and designedly left open for the admission of light, while in the *Indiana* they were supposed to be shut, and were not intended on that voyage to be left open or unfastened, and therefore concludes that the master could not be considered negligent or guilty of a fault of management in neglecting to shut or securely fasten a port hole which he supposed on sailing was properly fastened. In other words, the learned Judge holds that the ignorance of the master of the *Indiana*, that the port hole was open or insufficiently fastened, when the vessel sailed, rendered her unseaworthy, while his knowledge in the *Silvia* that the port was open prevented this result, although the physical conditions were similar. Is this a valid ground of distinction, which rests upon the knowledge or ignorance of the master at the time of sailing? In the first place, the master is not the only person, whose faults of management are covered by the Harter Act. The faults of the carpenter or second officer, or any member of the crew are equally within the purview of the Act, and it may well be argued that the person who actually left the port hole of the *Indiana* insecurely fastened, was aware or must legally be deemed aware of the fact at the time of sailing. But admitting that every soul on board was ignorant of the insecure fastening, does such ignorance render a vessel unseaworthy while under the same physical conditions but with knowledge of the fact, she would have been considered seaworthy. If to the rule of physical accessibility laid down in the case of *Steele* v. *The S. S. Co.*, *supra* (apparently approved by this Court in the *Silvia*), we are to add as the determining factor proof of the mental state of those in charge, we shall experience all the difficulties incident to the handling of psychical as distinguished

from physical facts. Memory is frail and defective, and conscious knowledge possessed at one moment may be lost the next. At what point of time must the knowledge be possessed to relieve the owner of unseaworthiness? And, if the knowledge is lost, that is, forgotten, will the burden of responsibility for unseaworthiness be instantly retransferred to the owner? One of the officers or crew may know of an open port an hour before sailing, he may forget the fact half an hour before sailing, or half an hour after sailing, and in either case the result is precisely the same as if he had never known, the damage is done. Yet if knowledge at the moment of sailing is the test, in one case the vessel was seaworthy and in the other she was not. There was knowledge in the case of the *Silvia*, but of what avail was it? Doubtless the uncovered ports were afterwards forgotten or the damage would have been prevented. The result is the same, whether the knowledge has been lost by forgetfulness or has never existed. It is respectfully submitted that this new modification of the rule of physical accessibility introduces difficulties and subtleties which will render it unacceptable to this Court.

The libellants have attempted to find further distinctions between the *Silvia* and the *Indiana*. They say:

1. That the port in the *Silvia* was much higher above the water line than that of the *Indiana*.

But, the difference was only about four feet, and the *Indiana* went five days without taking in water, while the *Silvia* went but half a day. The Court will hardly distinguish the cases on this ground.

2. That the compartments were of different character —that of the *Silvia* being a passenger hold, and that of the *Indiana* a cargo hold.

But it is undisputed that the compartments in the two cases were on precisely the same deck, viz., the between

decks, that both were covered with hatches battened down in precisely the same manner, and that in both access to the port holes was equally easy. In the *Indiana* it was the custom to carry passengers *frequently* in the compartment when the glass covers only were closed.*

3. That the glass cover being closed in the case of the *Silvia* afforded adequate protection against ordinary perils.

But the protection of the glass cover was *not* adequate on the voyage in question, and damage was done. So in the *Indiana* the fastening of both covers might be said to be sufficient for ordinary perils. There was negligence in both cases, the difference was one of degree, not of kind.

4. That in the *Silvia* the iron dummy was designedly left open to admit light, and it was the practice to leave it open.

When passengers were carried it was the practice also on the *Indiana*, and we concede that on the voyage in

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*Captain Shackford says (Record, p. 65):

"*Q.* Is that lower steerage used for cargo or passengers, or both?

"*A.* It is used for either.

"*Q.* What is the means of access from the upper deck to the upper steerage?

"*A.* By stairways and the hatch.

"*Q.* And from the upper steerage to the lower steerage?

"*A.* By stairways for the passengers and by taking off the hatch and putting an iron ladder alongside the hatch stanchions when there are no passengers."

And, on cross-examination.

"*XQ* Captain, do I understand that the hold is sometimes used for passengers?

"*A.* Yes, sir."

* * * * * *

On p. 66.

"*Q.* Berths had at times been placed in that hold?

"*A.* *Yes, we carry passengers there frequently.*"

question both covers were supposed to be closed, but the effect of knowledge and intention as a ruling factor in this class of cases has already been pointed out in the discussion of Judge DALLAS's views.

For the reasons stated the prayer of the petition should be granted, and the writ of Certiorari allowed.

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BIDDLE & WARD.
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